Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

JERRY WHEELER, PETITIONER

v.

MISSOURI HIGHWAY & TRANSPORTATION COMMISSION AKA MISSOURI DEPARTMENT OF TRANSPORTATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Jerry Wheeler claimed "reverse" gender discrimination by the Missouri Department of Transportation ("MoDOT") for the hiring of a grossly less-qualified lady. He claimed the discrimination was motivated by pressure induced on supervisors by an Affirmative Action Plan's ("AAP") set of parity goals. He claimed he was one of many victims of quota-induced discrimination. The District Court dictated Wheeler's case presentation. It allowed only a comparison of Wheeler's and the lady's qualifications. With numerous pretrial *in limine* orders, it disallowed massive evidence of similarly-situated discrimination. It disallowed references to the AAP and statistical evidence. Despite the restrictions, the jury found discrimination, but determined Wheeler would not have been hired anyway.

I. Is not pattern and practice evidence, and evidence surrounding an Affirmative Action Plan, available to an individual defendant, as per *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to prove not only "reverse" discrimination, but to help prove the pretext of a "same decision" defense?

II. Is there any difference, legally or factually, between proving pretext in a *McDonnell Douglas* format versus pretext in a "same decision" defense format?

III. Can a Court justly disallow circumstantial and pattern and practice evidence for a plaintiff which would show discriminatory motive and pretext, but then allow the defendant to present a portion of such

evidence to support a "same decision" allegation, even though it was directly contrary to its pretrial *in limine* ruling, and then not allow plaintiff any rebuttal to show why the evidence was meaningless and pretextual to a "same decision" defense?

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Wheeler v. Missouri Highway and Transp. Comm.*, 348 F.3d 744 (8th Cir. 2003). (App. 1a) The judgment of the Eastern District Court of Missouri is not published. (App. 20a) Rehearing En Banc Order. (App. 22a)

JURISDICTION

Judgment of the Eighth Circuit was entered on October 31, 2003. The Court also denied a timely petition for rehearing on December 19, 2003. This Court's jurisdiction is involved under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

42 U.S.C. § 2000e-2(a) and (m).

42 U.S.C. § 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B).

42 U.S.C. § 2000e-5. Enforcement provisions

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

* * *

(2)(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT

A. Trial Summary

District Court jurisdiction was evoked under 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and grounded upon 42 U.S.C. § 2000e et. seq.

Male, Jerry Wheeler, claimed discrimination in the hiring of a female, Terri Williams, over him for a skilled-craft position. The jury initially reported it was "hung." Later, it posed a question to the District Court regarding the "admissibility" of evidence about the ranking of another male, Greg Watson, over Wheeler by two of the three interviewers who were not the decisionmakers. That evidence was allowed by the

District Court to be presented as a "same decision" defense by MoDOT even though it was directly contrary to the District Court's own *in limine* order and a subsequent in-trial verbal order made directly to MoDOT's counsel. Despite the direct violation by MoDOT, the District Court disallowed plaintiff any rebuttal to that evidence.

The jury then entered an apparent compromise verdict. It determined discrimination occurred, but that Wheeler would not have been hired anyway. The District Court's judgment adopted the verdict. Both parties appealed. The Eighth Circuit affirmed the judgment.

B. Background Facts

Wheeler alleged there existed a pattern and practice of discrimination. He alleged MoDOT's Affirmative Action Plan ("AAP") caused pressure on its hiring supervisors to discriminate against males in order to meet parity goals within certain AAP timeframes. Wheeler alleged he was only one of many male victims of an unlawful quota system. He did not allege that MoDOT's AAP as written was unlawful because it allowed for no preferences. It provided simply for hiring of the "best qualified" applicants and strict use of equal employment opportunity principles. Wheeler claimed instead that it was the AAP's improper administration that was discriminatory.

From the very beginning, the District Court restricted Wheeler's case presentation. The Court totally dictated the case presentation. It ruled that Wheeler could only compare the qualifications of himself versus the female hired to show discriminatory

intent. It ruled Wheeler could not pursue his discrimination claim by showing a pattern and practice of discrimination against similarly-situated males. It disallowed any statistical evidence also.

Prior to trial, MoDOT made over fifteen all encompassing *in limine* motions which the Court granted. The major *in limine* orders would not allow Wheeler: (1) to present evidence where other hiring supervisors acknowledged gender preference being utilized in the hiring of grossly unqualified females over greatly qualified males for these skilled-craft positions; (2) to present any evidence at all about the structure or format of the Affirmative Action Plan; (3) to present any statistical evidence which grossly demonstrated female preferences in hiring; (4) to present any evidence of other apparent discriminatory hirings of unqualified females over very qualified males; and (5) to present any evidence concerning massive spoliation of hiring records by MoDOT contrary to federal and state laws.

Another important *in limine* ruling was that no evidence could be presented of comparing the qualifications of the other seven applicants for the particular job where Wheeler was interviewed and female Williams was hired. Only Wheeler's and the hired female Williams' qualifications could be compared. Wheeler desired to present such surrounding evidence concerning the qualifications of all of the applicants to show discriminatory motive. Three interviewers, including the decisionmaker, Scott Stone, marked *Applicant Evaluation Worksheets* with obvious arbitrary and insupportable determinations which totally favored the female hired. For example, they marked down that she was greatly experienced and no

other applicant received that level of grading despite the fact that there were at least four other applicants who previously (or currently) worked for MoDOT on a seasonal basis. The hired female's experience was simple labor work as a 16 year old, not the relevant, specific skilled-craft experience with MoDOT as per the other four applicants, including Wheeler. Thus, the marked *Applicant Evaluation Worksheets* demonstrated extreme pretext in selecting the hired female. That evidence would have been comparing qualifications of all the applicants which the District Court disallowed with a pretrial *in limine* order.

The District Court paid no attention to the common sense principle that the motivational factor for discrimination could be shown by the arbitrary grading on the *Applicant Evaluation Worksheets.* The District Court ignored the basic principle that MoDOT could have argued that even if Wheeler was greatly more qualified than the hired lady, that she was hired out of a political decision, or a mistake, and not due to the possible motivation of the supervisors having to reach the AAP parity goal.

Wheeler even expected to reveal to the jury that two interviewers, who were not the decisionmakers, told the decisionmaker that they ranked another male, Greg Watson, as the No. 1 candidate and Jerry Wheeler as the No. 2 candidate, and the hired lady, Williams, as the No. 3 candidate. Wheeler's contention against any such "same decision" argument by MoDOT would have been that the ranking by the other two interviewers was not properly performed because the applicant interviews did not comply at all with MoDOT's required *EEO Structured Interview System.* Thus, he would have contended that the ranking would not have been

sufficient proof of a likely proper selection of any person for the job over Wheeler. Wheeler would have contended because MoDOT would have the burden of proving a same decision defense, any ranking by the two non-decisionmakers was inappropriate, and not sufficient proof that Wheeler would not have been the person selected for the job.

MoDOT, after objection by Wheeler based on the *in limine* order and contrary to a direct bench-conference order by the District Court still presented a comparison of qualifications by bringing forth the ranking of Greg Watson over Jerry Wheeler. When MODOT's attorney went ahead contrary to the Court's directive and asked the "ranking" question, Wheeler objected again, but the Court allowed the question regardless. It, then, disallowed any rebuttal by Wheeler, including bringing forth all of the circumstantial surrounding evidence which Wheeler wanted to present in the first place - the whole truth.

Besides the specific allowance of MoDOT to violate one of its own *in limine* motions and disallowance of rebuttal, the District Court also disallowed any pattern and practice evidence and any evidence regarding the AAP which would have likely proven the primary motive of gender discrimination based upon MoDOT's desire to meet its AAP parity goals in a specific timeframe.

The jury posed a question to the District Court as to whether the ranking of someone above Wheeler was "admissible" evidence for them to consider, and the District Court only informed the jury that "it had the evidence and it had the law." The jury then transpired from an announced "hung" jury to a compromised jury.

The Court did not correct its partially-acknowledged error before the jury of allowing MoDOT to violate its *in limine* order.

The Court justified its ruling of allowing the evidence of the ranking of Greg Watson over Wheeler by claiming Wheeler initially brought up "ranking" evidence. The record reflects that Wheeler did not bring up any "ranking" evidence of other candidates or use of the word "rank[ ]" at all. He only compared Wheeler and the lady's qualifications as per the District Court's original order.

The Eighth Circuit affirmed the denial of any AAP circumstantial or pattern and practice evidence stating it could have no relevancy on a same decision defense "because the relevant inquiry . . . is whether, in the absence of discrimination, Wheeler would or would not have been hired."

The Eighth Circuit also affirmed the District Court's allowance of the defendant to violate the *in limine* order based upon the District Court's explanation that Wheeler initially brought up the ranking evidence which is *totally* contrary to the record. In addition, the Eighth Circuit's Opinion cites the bench discussion between the parties and the Court regarding Wheeler's objection to MoDOT's asking about the ranking issue. However, the Opinion leaves out the specific directive where the District Court told MoDOT's attorney that it could not bring up that issue about someone being ranked No. 1 above Wheeler. The Eighth Circuit unjustifiably failed to properly cite to the whole record and misstated the truth which is obvious in the record.

REASONS FOR GRANTING THE WRIT

I. THE AFFIRMATION BY THE EIGHTH CIRCUIT OF THE DISTRICT COURT'S DISALLOWANCE OF AN INDIVIDUAL PLAINTIFF TO PRESENT EVIDENCE OF SIMILARLY-SITUATED WORKERS, *i.e.* A PATTERN AND PRACTICE OF EVIDENCE, FOR THE PURPOSE OF PROVING BOTH DISCRIMINATORY MOTIVE AND PRETEXT OF DEFENDANT'S "SAME DECISION" DEFENSE IS TOTALLY CONTRARY TO MULTITUDINOUS DECISIONS BY THE SUPREME COURT, THE EIGHTH CIRCUIT ITSELF, AND ALL THE OTHER CIRCUITS.

The Eighth Circuit's opinion justifies the District Court's disallowance of pattern and practice evidence and circumstantial evidence surrounding the Affirmation Action Plan by stating that because Wheeler received a verdict of discrimination by the jury that any other evidence of discrimination by virtue of a pattern and practice would not be relevant to the same decision defense "because the relevant inquiry . . . is whether, *in the absence of discrimination*, Wheeler would or would not have been hired." The Eighth Circuit's opinion in this regard is totally contrary to common sense principles of law and evidence.

Proving discrimination and proving that defendant's asserted basis for its employment decision is pretextual are naturally and intimately interrelated. Both sub-issues make up the essence of the employment decision. A plaintiff alleges discrimination; the defendant alleges some other reason for its decision. The Courts recognize this

common-sense concept.

One of the U.S. Supreme Court's most recent decisions supports this understanding. In the *McDonnell Douglas* format of proof certain facts created a discrimination presumption, but a plaintiff still had to prove the "pretext" of the defendant's alleged reason for its employment decision. In the *Price-Waterhouse* format of proof, where a court determines the plaintiff presented sufficient evidence of discrimination, the burden of proving defendant's proffered reason for its employment decision shifts onto the defendant. 42 U.S.C. §2000e-5(g)(2)(B). Regardless of the proof formats, or their burdens, "*credibility of the parties*" usually becomes the main issue. Is defendant's proffered reason truthful or not? *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 2154 (2003) ("We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Products, Inc.*, 530 U.S. 133 (2000), we recognized that evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form' of circumstantial evidence that is probative of intentional discrimination.").

Evidence of "similarly-situated" discrimination and background circumstances can affect the determination of whether a discriminatory motive existed *and* whether defendants proffered reason for its employment decision is pretextual. It must be sensibly recognized that a "heavy" motivation to discriminate (caused, for example, by unlawful quotas) can provide a strong foundation for disputing a defendant's proffered non-discriminatory reason that it would have made the "same decision" anyway with

respect to an individual plaintiff.

The Eighth Circuit did not recognize this inherent relationship between evidence used to prove discriminatory motive and that evidence equally addressing defendant's proffered reason for its decision. The Eighth Circuit, instead, distinguished evidence between these two sub-issues.

The Eighth Circuit supported the District Court's decision to disallow all of the massive amount of similarly-situated and background evidence of discrimination which Wheeler tendered. The Eighth Circuit reasoned that the exclusion of evidence would not have made any difference in this case because the jury found discrimination anyway. The Eighth Circuit justifies that position by stating that additional circumstantial evidence regarding discrimination could not logically have influenced the jury's "same decision" determination *because the jury is to make that determination "in the absence of discrimination."* The Eighth Circuit's justification, thus, ignores the close interrelationship between these two sub-issues which comprise the whole question placed before the jury. *The decision to be made by the jury "in the absence of discrimination" does not mean that evidence of a pattern of discrimination might not be so overwhelming as to effect the credibility of defendant's proffered reason for its decision.* Sure, the jury is not to consider the discrimination factor when making its "but for" determination, but that does not mean it cannot or should not *weigh defendant's credibility* based partially upon the evidence of the case as a whole. *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1105 (8th Cir. 1988).

Pattern discrimination helps to remove *credibility* from "blame the victim" defenses posed against individuals who bring suit. *Easley v. Empire, Inc.*, 757 F.2d 923, 931 fn.8 ("Finally the District Court found evidence of pretext through examining Empire's general policy and practice with respect to female employment. See *McDonnell Douglas Corp. v. Green* [cite omitted]."); *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155-6 (8th Cir. 1990) ("Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial."); *Patterson v. Masem*, 774 F.2d 251, 255 (8th Cir. 1985) ("A defendant's 'general policy and practice with respect to minority employment' may be evidence that the reasons offered for an individual employment decision are pretextual."); *Hindman v. Transkrit Corp.*, 145 F.3d 986, 993 fn.26 (8th Cir. 1998) ("A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries."); *LeClair v. City of St. Paul*, 187 F.3d 824, 828 (8th Cir. 1999) ("The factfinder must be allowed to see the 'big picture.'")

The Eighth Circuit's decision did not consider the specific factual evidence posed by Wheeler in making its determination that evidence of similarly-situated persons is not relevant to the "same decision" defense. Instead, the Eighth Circuit's decision ignores the logical, legal directions of the U.S. Supreme Court and Title VII. Consideration by this Court is therefore necessary to secure and maintain uniformity of the law in the U.S. and in the Eighth Circuit.

II. THE DISTRICT COURT'S MAJOR EVIDENTIARY ERRORS ALSO CONTRIBUTED IN A WEIRD MANNER TO THE "SAME DECISION" VERDICT OF THE JURY AND IT SHOULD NOT STAND AS ANY BASIS AGAINST REVERSAL FOR THE EXTREME DENIAL OF RELEVANT EVIDENCE AS PER REASON I.

The manner in which the same decision verdict was rendered by the jury as supported by the Eighth Circuit's affirmation of the District Court with untrue representations of the record also supports the basic principle that the disallowance of evidence and the truth before the jury caused an unjust verdict with respect to the "same decision" defense.

One of the District Court's *in limine* rulings mandated that Wheeler could not compare qualifications, or present other surrounding evidence, regarding any of the other applicants for the specific job opening where Williams was hired over Wheeler. Wheeler, however, desired to present such evidence for several reasons.

For example, a comparison of the *Applicant Evaluation Worksheets* filled out for each of the nine interviewees reveals blatant favoritism via irrational grading inconsistencies. Proof of such scoring would have substantially hurt MoDOT's hiring supervisor's *credibility* in general, and thus, also effected any "same decision" defense. Even more importantly, Wheeler desired to be truthful to the jury and let it know the whole job-selection circumstances surrounding the hire of female Williams. Wheeler did not care that Greg Watson was ranked No. 1 by two of the interviewers

while he was ranked No. 2. Why did he not care? Wheeler expected to show how MoDOT *did not use its Standard Hiring Procedures* when it interviewed and graded the interviewees, nor when hiring supervisor, Scott Stone, asked the other two interviewers, Mr. Barton and Mr. Smith, to rank the top three interviewees. By disallowing this surrounding evidence, and limiting the evidence to only a qualification-comparison between Wheeler and Williams, the District Court negated very impeaching and contradictory evidence to MoDOT's position that Wheeler would not have been hired anyway. This credibility challenge would apply regardless of what kind of "same decision" defense a jury would rely upon.

Wheeler can find no other reported discrimination case with such a severe restriction on the background evidence regarding *the very employment decision* under consideration. The Eighth Circuit accepted the District Court's *in limine* ruling and also relied upon the District Court's expressed justification for what happened at the trial. *However, the factual statements made by the District Court in its post-trial ruling are not accurate as manifested in the official court record.* Some of those factual errors are as follows.

1. The Eighth Circuit "*deem[ed] it significant*" the District Court's claim that it did not rule before trial that "ranking" was not an issue in the case. This interpretation by the District Court of its *in limine* ruling makes no sense in light of the ruling's very nature and content. The ruling did not allow any comparison of qualifications of the other seven applicants interviewed. Obviously, a "ranking" is comparing qualifications. *If a ranking is presented*

before the jury, then why cannot the qualifications be examined by the opposing party? In fact, it was the unrebutted "ranking" that likely caused the "same decision" verdict!

2. The Eighth Circuit decided the District Court "*committed no error*" because "Wheeler's counsel was given an opportunity to go further and offer rebuttal evidence to show that Wheeler was more qualified than Mr. Watson, who was ranked number one." *This conclusive fact to support the Eighth Circuit's affirmation of the District Court is absolutely untrue.* When Wheeler started to address the issue of Watson's No. 1 ranking in order to show it was not in accord with MoDOT's *Standard Hiring Procedures*, the District Court flat denied Wheeler that opportunity, and in fact, chastised Wheeler's counsel instead. *Wheeler could not even mention Watson by name, much less compare qualifications.* The District Court even tried to accuse Wheeler of wanting "to trash Watson!" Wheeler would not have in his rebuttal pursued comparing Watson to Wheeler "to trash him," only to show that the "ranking" was not properly performed, and thus, was not credible evidence for the jury to rely upon. *The official court record reflects where MoDOT violates the in limine order; where the District Court mistakenly suggests Wheeler first brought up the ranking issue and left open a "blank No. 1" during direct exam, and where MoDOT denies the obvious fact that it brought forth the "blank No. 1", and where the District Court then suggests possible correction, but then says it did not believe its in limine ruling had "been jeopardized to this point"); where Wheeler wanted to bring up various evidence surrounding Watson thinking the door was opened, but the District Court said because Watson's name was not*

mentioned by MoDOT that "the blank No. 1" was not brought up and told Wheeler he could not interject Watson's name again or suffer a mistrial and costs). The Eighth Circuit left the above facts totally out of its analysis and out of its fn.3.

3. *What are the true facts of what happened at trial?* MoDOT asked a question about supervisor Scott Stone's request for a ranking of the top three interviewees. Obviously, that evidence would bring out the fact of a No. 1 candidate ranked above Wheeler. Wheeler objected because the evidence would necessarily compare qualifications - contrary to the *in limine* order. During the sidebar on Wheeler's objection, the District Court specifically told MoDOT's counsel that MoDOT could not "leave a blank for number one." The District Court suggested that if MoDOT did that, then it "might open the door either in this case or in your rebuttal about those other people." The Court added that if MoDOT only "compares and contrasts Wheeler and Williams" that MoDOT's questioning would be allowed.

Despite the warning, MoDOT brought forth the "pregnant negative" (District Court's terminology - not Wheeler's), i.e. "a blank person for number one," and the Court allowed the question and answer anyway. It then denied Wheeler's second objection and blamed Wheeler for the "ranking" evidence being presented by MoDOT by accusing Wheeler's counsel of supposedly bringing it up first. The Eighth Circuit, in accepting the District Court's justification, ignored the fact that the District Court was factually incorrect. *Wheeler did not use the words "rank" or "ranking," nor did he compare the qualifications of anyone else but Williams and him in his direct examination.* Yet, MoDOT was

allowed literally to "poison the jury" with the suggestion Wheeler would not get the job anyway because he was ranked No. 2. *MoDOT's question to Mr. Barton about the "ranking" was obviously solely for that purpose - to present a "same decision" defense that Wheeler would not be hired anyway because Watson was ranked No. 1.* It certainly would not help MoDOT to bring up that Wheeler was ranked by Mr. Barton and Mr. Smith above Williams! No doubt MoDOT forced exposure of the "blank No. 1", succeeded without having any rebuttal, and won on that defense with the District Court's support, in essence.

MoDOT was protected by the District Court from any rebuttal which would have provided a fair presentation of the whole facts. No further references could be made to the other interviewees even when the evidence was to simply show the preordained hire of female Williams. When the District Court and parties later discussed MoDOT's ranking evidence, the Court suggested it might somehow correct the error, but then it would not. In fact, it later denied any possible error occurred and blamed Wheeler instead; the District Court ruled that the No. 1 ranked interviewee, Greg Watson, could not be brought up *at all in any way or fashion*, or the Court would declare a mistrial and punish Wheeler with the court costs.

It was Wheeler who wanted up front to present the whole applicant-grading scenario and "ranking" situation, and then point out its true uselessness, but the Court at pretrial unfairly denied it. In the end, the way the evidence was allowed in for MoDOT and disallowed for Wheeler, it made Wheeler appear to be untruthful to the jury by not exposing the No. 1 ranking in the first place. MoDOT got to do it, and

thus, MoDOT looked truthful to the jury, while at the same time Wheeler was objecting. Then the jury notices that Wheeler does not rebut the "ranking" evidence. The Court even instructed the jury to disregard evidence when he in rebuttal started to bring up Greg Watson. So, that is likely the reason the jury had to ask the District Court if the evidence was "admissible" and if they could consider it! It is also obvious that the "ranking" evidence likely had a bearing on the jury's "same decision" determination. *See fn.4 of Eighth Circuit Judgment.* The record is quite clear, but it is being ignored by the Eighth Circuit's written decision.

CONCLUSION

This case presents questions of exceptional importance. Accordingly, petitioner Wheeler asks this Court to grant his petition for Writ Of Certiorari.

Respectfully submitted,

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(Any footnotes trail the end of each document)

Nos. 02-3569/3570

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jerry Wheeler,
Plaintiff-Appellee/Cross-Appellant,

Jeanette Wheeler,
Plaintiff,

v.

Missouri Highway & Transportation Commission, also known as Missouri Department of Transportation,
Defendant-Appellant/Cross-Appellee.

September 8, 2003, Submitted
October 31, 2003, Filed

COUNSEL: For Jerry Wheeler, Plaintiff - Appellee (02-3569): Charles R. Douglas, Glen Carbon, IL.

For MISSOURI HIGHWAY & TRANSPORTATION COMMISSION aka Missouri Department of Transportation, Defendant - Appellant (02-3569): Melinda Grace-Beasley, MISSOURI HIGHWAY & TRANSPORTATION COMMISSION, Legal Department, Jefferson City, MO.

For Jerry Wheeler, Plaintiff - Appellant (02-3570): Charles R. Douglas, Glen Carbon, IL.

For MISSOURI HIGHWAY & TRANSPORTATION COMMISSION aka Missouri Department of Transportation, Defendant - Appellee (02-3570): Melinda Grace-Beasley, MISSOURI HIGHWAY & TRANSPORTATION COMMISSION, Legal Department, Jefferson City, MO.

JUDGES: Before SMITH, LAY, and BRIGHT, Circuit Judges.

OPINIONBY: LAY

OPINION: LAY, Circuit Judge.

Jerry Wheeler brought this "reverse discrimination" case asserting that the Missouri Highway and Transportation Commission ("MHTC") hired a female employee rather than Wheeler for a permanent crew worker position. The jury found that Wheeler had been discriminated against, but denied damages on the ground that Wheeler, in any event, would not have received the promotion. MHTC appeals the district court's order denying its post-trial motions for judgment as a matter of law and for a new trial. Wheeler, in a cross-appeal, argues that the district court abused its discretion by: 1) restricting the theory of Wheeler's case and the types of evidence allowed; 2) denying Wheeler's motions to amend his pleadings to include injunctive and declaratory relief; and 3) reducing Wheeler's attorney fee request. We affirm.

I. BACKGROUND

MHTC is an agency of the State of Missouri responsible for the maintenance and care of the state's highway

system. The Missouri Department of Transportation ("MoDot") is an organization operating under the control of MHTC that carries out the construction and maintenance of state roadways. Jerry Wheeler was employed by MoDot as a seasonal/temporary maintenance worker in 1995 and 1997. In May 1998, Wheeler applied for a permanent crew-worker position. Wheeler and nine other candidates were interviewed. One of the female candidates, Terri Williams, was hired.

MHTC states that the candidates were asked the same questions and that the hiring decision was based on the experience and background of the applicants together with the interview. Williams did very well in her interview, MHTC asserts, whereas Wheeler was upset and agitated and raised his voice to the interviewers, indicating that he was going to be very upset if a female were hired for the job. One of the interviewers, Scott Stone, testified that Wheeler's behavior reminded Stone of an incident in 1997 when Wheeler exhibited similar angry and confrontational behavior.

Wheeler alleges that Williams was much less qualified than he was. He asserts that Williams was specially sought out to fill the position, and that MoDot did not follow standard employment procedures in hiring Williams. Wheeler contends that the hiring was discriminatory because it was based on gender and not on the merits of the candidates.

On June 15, 1999, Wheeler filed a Title VII gender discrimination claim against MHTC. Wheeler's claim was tried before a jury which found that the hiring decision was motivated by gender and therefore discriminatory. They also found, however, that MHTC

would not have hired Wheeler even if there had been no discrimination. Thus, Wheeler was awarded no actual damages.

Both parties made post-trial motions. MHTC brought motions for judgment as a matter of law and for a new trial. Wheeler brought motions: 1) to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e); 2) for a new trial; 3) for sanctions and relief from judgment pursuant to Fed. R. Civ. P. 60; and 4) for attorney fees. All post-trial motions were denied except Wheeler's motion for attorney fees, which the district court reduced to $ 21,250. n1

II. MHTC's APPEAL

MHTC appeals on two grounds. First, MHTC argues that the district court erred in denying its motion for judgment as a matter of law because there was insufficient evidence to support the jury's verdict that MHTC's decision not to hire Wheeler was discriminatory. Second, MHTC appeals the district court's refusal to grant a new trial. It argues that the district court abused its discretion in allowing Wheeler to admit evidence of MHTC's affirmative action plan ("AAP"), given that there was insufficient evidence in the record that MHTC acted pursuant to the plan.

A. Sufficiency of the Evidence

We review the denial of a motion for judgment as a matter of law de novo, using the same standard as the district court. Ogden v. Wax Works, Inc., 214 F.3d 999, 1005 (8th Cir. 2002). We consider the evidence in the light most favorable to the non-moving party, resolving

all conflicts in the evidence in Wheeler's favor and assuming as proved all facts that his evidence tended to show. In addition, we must give the non-moving party the benefit of all favorable inferences that may be reasonably drawn from the facts proved. Hathaway v. Runyon, 132 F.3d 1214, 1220 (8th Cir. 1997).

MHTC asserts that the only evidence of discrimination at trial was its affirmative action plan. MHTC argues that it cannot be held liable for discrimination by acting pursuant to a valid AAP. See Christensen v. Equitable Life Assurance Soc'y, 767 F.2d 340, 343 (7th Cir. 1985) (noting that "a lawful affirmative action program is not evidence of discrimination"), cert. denied, 474 U.S. 1102, 88 L. Ed. 2d 920, 106 S. Ct. 885 (1986).

We find MHTC's assertion to be unconvincing. In numerous discussions both before and during the trial, the district court stated that the issue was not the existence and validity of the AAP, but the relative merits and qualifications of the two individuals. As the district court noted, MHTC agreed with this theory of the case and chose to defend the case on the merits of the hiring decision, "without reference or refuge to an affirmative action plan." Accordingly, the district court granted MHTC's motion in limine to exclude evidence of the AAP. The only evidence of the AAP the district court allowed was Wheeler's inquiry on cross-examination as to whether the AAP played any role in the interviewer's hiring decision.

MHTC seems to equate Wheeler's evidence of pressure from upper level management to hire females as evidence of the AAP. This is inaccurate. Evidence of illegal and discriminatory motive to hire on the basis of

sex and not on the merits of the candidates is distinct from evidence of a valid AAP. The basis of Wheeler's argument was not that MHTC acted pursuant to the AAP, which he conceded was valid, but that there was pressure from upper management to hire females in violation of the AAP's commitment to equal employment opportunity standards, which led to the discriminatory hiring.

Wheeler supported this theory of the case with evidence independent of the AAP, including: 1) testimony of one of the interviewers that Wheeler's qualifications were much better than Williams, that normal interview procedures were not followed, and that, in his opinion, equal employment opportunity procedures were not followed; 2) testimony of two of the three interviewers that they felt pressure to recommend the female employee because she was female, despite the fact that they felt Wheeler had better qualifications; 3) testimony of Wheeler's supervisor that he told Wheeler that he would be lucky to get the job because it was widely known that "they were going to hire a lady;" 4) testimony that Williams was especially sought out for the position; and 5) evidence that Wheeler was more experienced and skilled for the position than Williams. We find that this evidence was sufficient to support the jury's verdict of discrimination.

B. New Trial

Based on the foregoing discussion, we also find that the district court did not abuse its discretion in refusing to grant MHTC a new trial. While MHTC asserts that the district court erroneously admitted evidence of the

AAP, even assuming it was admitted erroneously, the evidence was not so prejudicial that a new trial would produce a different result. See Bevan v. Honeywell, Inc., 118 F.3d 603, 612 (8th Cir. 1997). ("A new trial is not warranted on the basis of an evidentiary ruling unless the evidence was so prejudicial that a new trial would likely produce a different result."). Wheeler offered evidence, independent of the AAP, sufficient to support the jury's verdict of discrimination.

III. WHEELER'S CROSS-APPEAL

Wheeler argues on appeal that the district court abused its discretion by dictating the theory of Wheeler's case and wrongfully excluding evidence that Wheeler needed to prove his case. Wheeler also argues that the district court abused it discretion in denying Wheeler's motions to amend his pleadings to include declaratory and injunctive relief, and in calculating his attorney fee award.

A. Dictation of the Case and Evidence Allowed

Wheeler cites in a rambling brief, which is difficult to understand, a great number of instances in which he believes the district court abused its discretion by excluding evidence and dictating the theory of his case. For purposes of our analysis, these alleged abuses may be divided into two categories: 1) those "abuses" relating to the discrimination phase of the case, and 2) those relating to the "same decision" verdict.1. Excluded Evidence and "Abuses" Relating to Discrimination

There is no reason to discuss Wheeler's numerous allegations of erroneously excluded evidence and unfair adverse rulings regarding discrimination for the simple reason that Wheeler prevailed on that issue. The jury, in fact, found discrimination. Therefore, even if meritorious, Wheeler's allegations of abuse of discretion would not warrant a new trial because the admission of additional evidence or other rulings in Wheeler's favor would not change the outcome on this issue. See Mems v. City of St. Paul, Dep't of Fire and Safety Servs., 327 F.3d 771, 779 (8th Cir. 2003) ("Ultimately, Appellants must show two things to gain relief from a faulty evidentiary ruling: (1) that the district court abused its discretion, and (2) that the evidentiary ruling was prejudicial to the point of producing a different verdict.").

We are not persuaded by Wheeler's argument that additional evidence regarding discrimination would have also influenced the jury's "same decision" finding. Additional evidence regarding discrimination could not have influenced the "same decision" verdict, because the relevant inquiry for the jury on that issue is whether, in the absence of discrimination, Wheeler would or would not have been hired. n2

2. Excluded Evidence Relating to the "Same Decision"

MHTC can avoid liability, even where a jury finds that there was discrimination, by showing that it would have made the same decision without discrimination. See, e.g., Ross v. Douglas County, Nebraska, 234 F.3d 391, 397 (8th Cir. 2000) ("Once plaintiff introduces direct evidence of discrimination, the burden shifts to the employer to show, by a preponderance of the evidence,

'that it would have made the same decision even if it had not taken the plaintiff's [gender] into account.'") (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989)). In the instant case, the jury found that even without discrimination, MHTC would not have hired Wheeler. Wheeler argues that this verdict was based substantially on two erroneous evidentiary rulings: 1) MHTC was unfairly allowed to bring up, and Wheeler was prevented from rebutting, "ranking evidence" of applicants other than Wheeler and Williams; and 2) the district court wrongfully excluded Wheeler's rebuttal testimony of MHTC's sole witness, Scott Stone, as hearsay.

a. Ranking Evidence

The district court consistently instructed the parties to focus on Williams and Wheeler, and not the other applicants. The primary issue was to be whether Williams or Wheeler was more qualified. Consistent with this theory of the case, the district court granted MHTC's motion in limine prohibiting Wheeler from introducing any evidence concerning the qualifications of other applicants, thereby limiting the proof as to the other applicants in order to prevent the jury from hearing evidence that was not relevant. Wheeler argues that the district court abused its discretion by admitting testimony in violation of its previous order without allowing Wheeler to address the issue on rebuttal or correct the matter in a jury instruction. n3

Wheeler argues that this testimony violated the district court's in limine ruling and created a "pregnant negative" that there was someone ranked above

Wheeler. Wheeler contends that this testimony contributed substantially to the jury's same decision verdict, as evidenced by the jury's question on this issue to the court during its deliberations. n4

MHTC argues that there was no abuse of discretion for three reasons. First, Wheeler was the first to bring up evidence of "ranking" by asking whether Barton recommended Wheeler as better qualified than Williams. Second, the testimony did not violate the district court's in limine order because MHTC asked Barton only about Wheeler and Williams. Third, the "ranking" evidence did not play a significant part in the "same decision" determination by the jury, because of the evidence of Wheeler's bad demeanor during the interview was sufficient to support the jury's verdict.
At the hearing on the post-trial motions, the district court went into great detail with counsel as to why he felt there was no prejudicial error in his rulings. The district court found that the jury's findings on the "same decision" instruction were consistent with the Defendant's theory of the case. n5

Based upon the district court's explanation and the fact that Wheeler's counsel was given an opportunity to go further and to offer rebuttal evidence to show that Wheeler was more qualified than Mr. Watson, who was ranked number one, we find the district court committed no error.

b. Wheeler's Excluded "Hearsay" Testimony

Wheeler also argues that he should be granted a new trial on the basis that the district court wrongfully excluded Wheeler's rebuttal of the testimony of Scott

Stone, an interviewer. Stone testified that Wheeler raised his voice in the 1998 interview, and that this reminded him of a similar incident in a 1997 meeting where Wheeler, as a temporary employee, had also raised his voice. Wheeler wished to take the stand in rebuttal to testify that, in 1997, Mr. Stone had mistaken Wheeler for someone else and that "there was another gentleman who made a sarcastic remark that Mr. Stone got mad about." However, during a sidebar conference before Wheeler took the stand, MHTC's attorney objected to this anticipated testimony on the grounds of hearsay. The district court agreed, allowing Wheeler to testify about the meeting, but not about the other gentleman's sarcastic remark.

Wheeler's proposed rebuttal testimony regarding the "other gentleman's sarcastic remark" was not hearsay. "Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." Anderson v. United States, 417 U.S. 211, 219, 41 L. Ed. 2d 20, 94 S. Ct. 2253 (1974); Fed. R. Evid. 801(c). Evidence of the sarcastic remark, even if Wheeler could have remembered the content of the remark (which he could not), was not offered to prove the truth of that remark, but only to show that Stone was mistaken about who had raised his voice in the 1997 meeting.

As previously noted, however, "[a] new trial is not warranted on the basis of an evidentiary ruling unless the evidence was so prejudicial that a new trial would likely produce a different result." Bevan, 118 F.3d at 612. Wheeler was not prohibited from testifying about the 1997 meeting or from denying Stone's assertion that Wheeler had appeared angry at this meeting. We

believe that this afforded Wheeler a sufficient opportunity to rebut Stone's testimony and that being prevented from testifying about the substance of the sarcastic remark is not reversible error.

B. Amending the Complaint for Declaratory and Injunctive Relief

Both pre-trial and post-trial, Wheeler moved to amend his complaint to add appropriate injunctive relief. Post-trial, Wheeler also moved to include a prayer for declaratory relief. The district court denied these motions.

We review the district court's denial of leave to amend a complaint for an abuse of discretion. Mouser v. Caterpillar, Inc., 336 F.3d 656, 666 (8th Cir. 2003). The Federal Rules of Civil Procedure contemplate that "amendments to pleadings should be allowed with liberality where necessary to bring about the furtherance of justice and where the adverse party will not be prejudiced." Corsica Livestock Sales, Inc. v. Sumitomo Bank, 726 F.2d 374, 377 (8th Cir. 1983). However, "the decision to allow or deny an amendment is a discretionary matter for the district court to resolve." McLaurin v. Prater, 30 F.3d 982, 985 (8th Cir. 1994).

We find no abuse of discretion in the district court's denial of Wheeler's motion to amend the complaint. Wheeler makes little argument that the district court abused its discretion other than to state that such relief "would [have been] appropriate" and that the district court "failed to explain a reason to not grant the relief." This is not accurate. The district court did, in fact,

explain that the requested amendment was "untimely filed and unduly prejudicial, and not supported by the evidence at trial and the applicable case law." Since Wheeler points to no abuse of discretion by the district court, and we find none, we affirm on this issue.

C. Attorney Fees

Wheeler argues that the district court abused its discretion in determining its award of attorney fees by: 1) crediting only 510 (from 1,664.62) hours worked by Wheeler's attorney on the case; 2) reducing counsel's hourly rate from $ 150 to $ 125; and 3) reducing counsel's fee award based on his limited success.

We review a district court's award of attorney fees for an abuse of discretion. Peanick v. Morris, 96 F.3d 316, 323 (8th Cir. 1996). The method for determining attorney fees is well established. "The starting point in determining attorney fees is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates." Fish v. St. Cloud State Univ., 295 F.3d 849, 851 (8th Cir. 2002) (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)). The district court should exclude hours that were not reasonably expended. Hensley, 461 U.S. at 434. The onus is on the party seeking the award to provide evidence of the hours worked and the rate claimed. Id. at 433. Finally, the district court should adjust the fee upward or downward on the basis of the results obtained. Id. at 434; see also Fish, 295 F.3d at 852.

Regarding the number of hours Wheeler's attorney spent on the case, the district court appears to have

considered the time and labor required and the novelty and difficulty of the issues and reduced the hours accordingly. Hensley, 461 U.S. at 430; see also Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1273-74 (8th Cir. 1981). The district court found that counsel had taken some thirty-seven depositions, many of which were not warranted.

Likewise, the district court did not abuse its discretion in reducing the hourly fee. The burden is on the moving party to provide evidence supporting the rate claimed. Hensley, 461 U.S. at 433. Here, Wheeler provided no evidence that the $ 150 per hour rate was the prevailing rate or otherwise reasonable. Furthermore, the $ 150 per hour figure seems suspect, given that earlier in the proceedings Wheeler's attorney had represented his rate to be $ 125 per hour.

Finally, the district court did not abuse its discretion in reducing Wheeler's attorney fee based on his degree of success. In awarding attorney fees, "the most critical factor is the degree of success obtained." Id. at 436. Here, as the district court explained, the reduction correctly reflected the "same decision" verdict.

The appeal and cross-appeal are both denied. The judgment of the district court is AFFIRMED.

FOOTNOTES

n1 Wheeler sought attorney fees totaling $ 253,658.

n2 Jury Instruction 6 charged the jury as follows:

Your verdict must be for plaintiff, Jerry Wheeler, and

against defendant, Missouri Highways [sic] and Transportation Commission, on plaintiff's gender discrimination claim if all the following elements have been proved by the greater weight of the evidence.

First, defendant failed to hire plaintiff; and

Second, plaintiff's gender was a motivating factor in defendant's decisions.

If either of the above elements has not been proved by the greater weight of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim.Jury Instruction No. 7 directed:

If you find in favor of plaintiff under Instruction No. 6, then you must answer the following question on the verdict form: Has it been proved, by the greater weight of the evidence, that defendant wouldn't have hired plaintiff regardless of his gender?

n3 Wheeler refers to the following exchange that occurred during MHTC's examination of one of the interviewers, Ron Barton:Q [by Grace-Beasley, MHTC's attorney]: Now at some point after all the interviews were concluded . . . Mr. Stone asked you to rank who you thought should get the position?

A: Yes.

Q: Okay. And I am not asking you about anyone else - - just about, let's say, Mr. Wheeler - - let me ask you this: What specific instructions did he give you, as far as ranking who he thought should get the position?

Mr. Douglas [Wheeler's Attorney]: Your Honor, I want to make an objection. Could we approach . . . ? (Whereupon the following sidebar conference took place:)

Mr. Douglas: This was very specifically ordered by the Court that we weren't going to get into this ranking situation with respect to anyone; and that all we were talking about was Mr. Wheeler and Mrs. Williams.

The Court: She just said not to mention anybody else's name.

. . . .

The Court: You asked him if he ranked Wheeler above Williams.

Mr. Douglas: No. All I asked he said [sic] that Wheeler was better than Williams.

. . . .

Ms. Grace-Beasley: Yes. And my question was very specific. I am not asking who he ranked number one. I am asking about Wheeler, and I am asking about Williams.

The Court: If she compares and contrasts Wheeler and Williams, that's what you were doing.

Mr. Douglas: I don't have a problem with that.

. . . .

(Whereupon, the sidebar conference concluded.)

Q: Can you tell me what Mr. Stone's instructions were with respect to ranking the candidates?

A: Yes. He asked [another interviewer] and myself to write down on a piece of paper and give to him the top three as we saw them.

Q: And how did you rank Mr. Wheeler? Did you give him a number?

A: Yes.

Q: How did you rank Mr. Wheeler?

A: Number two.

Q: Okay. And how did you rank Mrs. Williams?

A: Number three.

Mr. Douglas: Your Honor, I have an objection. (Trial Tr., Vol. II at 376-80).

n4 During deliberations, the jury submitted the following question to the district court:Please clarify what is considered as "admissable" [sic] discussion regarding the statements made that there was a "first" choice candidate refered [sic] by Mr. Barton and Mr. Smith. i.e. Can we discuss the existence of a candidate over both Mr. Wheeler and Ms. [sic] Williams?The district court responded:You are to be guided by the evidence as presented and the instructions on the law as given to you.(Gen. App. at 590).

n5 In explaining its basis for its ruling, we deem it significant that the district court said as follows:

I never ruled before the trial that ranking was not an issue in the case.

The ruling that I was requested to consider and the ruling that I made was that we were not going to get into mini trials of extraneous people in the process.

There was an allegation that the Highway Commission hired a female instead of Mr. Wheeler, and I wanted to keep the focus on that hiring decision, and not to digress into qualifications of other people who were not Mr. Wheeler, who may or may not have been hired because of the hiring decision made by the Highway Commission.

. . . .

I never said you couldn't rank anybody, or how are we going to get there.

But I didn't want to then have a discussion about, "Well, so and so applied, and, look, they had these qualifications," . . . .

Now, all that being said, it was the plaintiff who for the first time asked about the ranking of candidates in the examination of Mr. Barton when he specifically asked the ranking questions, juxtaposing Mr. Wheeler to the person who was hired, opening the door on cross-examination to being more specific.
So this preoccupation that somehow the defendant should be sanctioned for ranking the applicants is

misplaced, because what I ruled was we weren't going to go into the qualifications of the people who were not critical to this case.

And when this issue was first raised, it was raised by the plaintiff.

. . . .

Having asked Mr. Barton to rank Mr. Wheeler and the person who was hired was perfectly proper cross-examination to ask then where Mr. Wheeler ranked overall for the job.

And I don't find that logically inconsistent.

It's highly probative and appropriate, given the way the evidence was presented. And consistent with the Court's pretrial rulings.

The other thing I did do -- and I've gone back and looked, because I thought about it at the time -- was I also made it clear to the plaintiff that if it was believed that the ranking issue raised the specter of issues relative to qualifications, that rebuttal testimony could be presented, after consultation with the Court as to the nature and scope, that would permit further development of those issues, if the plaintiff so choose. . .

No latitude in rebuttal was requested.(Tr. of Hr'g on Post-Trial Mots. at 15-19).

Case Number: 4:99CV969 RWS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Jerry Wheeler,
Plaintiff(s),

V.

Missouri Highway & Transportation Commission, aka
Missouri Dept. of Transportation,
Defendant(s).

January 28, 2002

JUDGMENT IN A CASE

■ Jury Verdict. This action came before the Court for a trial jury. The issues have been tried and the jury has rendered its verdict.

□ Directed Verdict. This action came before the Court for a trial by jury, the Court having sustained defendant's motion for judgment as a matter of law at the close of plaintiff's case.

□ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that on gender discrimination claim of

Plaintiff Jerry Wheeler, we find in favor of Plaintiff Jerry Wheeler. It has been proved by the greater weight of the evidence that defendant would have not hired plaintiff regardless of his gender.

James C. Woodward
Clerk

By: Deputy Clerk

Nos. 02-3569/02-3570

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jerry Wheeler,
Appellee/Cross-Appellant,

Jeanette Wheeler,
Plaintiff

v.

Missouri Highway & Transportation, etc.,
Appellant/Cross-Appellee.

December 19, 2003, Decided

OPINION:

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 19, 2003